Supreme Court of the United States.

October Term, 1908.

No. [redacted],

[redacted],

Petitioner,

vs.

J. B. COLE AND T. E. MATHEWS, *Respondents.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF OF PETITIONER.

DENNIS T. FLYNN,
ROBERT M. HAINEY,
STREETER B. FLYNN,
WILLIAM NEFF,
LEWIS E. NEFF,
Counsel for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 328.

ELI BUNCH, *Petitioner,*

vs.

J. B. COLE AND T. B. MATHEWS, *Respondents.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF *of* PETITIONER.

Statement of the Case.

This action was originally instituted in the District Court of Muskogee County, Oklahoma, by Eli Bunch as plaintiff against J. B. Cole and T. B. Mathews as defendants, to recover the landlord's customary share of the value of the crops produced on eighty acres of the plaintiff's lands for the years 1916, 1917 and 1918, in the sum of $2625.00, and for One Thousand Dollars exemplary damages and costs.

The plaintiff alleged in his petition that he was a full-blood Cherokee Indian, that he received as his homestead and surplus allotment the West One-Half of the Northeast Quarter of Section Sixteen, Township Ten North, Range Twenty East, that the plaintiff was in the United States military service during 1917 and 1918, that the defendants were co-partners and that in 1917 and 1918, the defendant, J. B. Cole, was chairman of the council of defense at Porum; that the land is fine bottom land, that in 1915, the defendants took a pretended lease on said land for the year 1916, which was void because in violation of the statutes of the United States, that in June, 1916, the defendants took a pretended lease upon said land for the year 1917, that in July, 1917, the defendants took a pretended lease on said land for the year 1918 from the mother of the plaintiff, and in May, 1918, took a pretended lease on said land for the year 1919 from the mother of the plaintiff, but that all said pretended leases were void because in violation of the statutes of the United States relating to the leasing of lands of full-blood Cherokee Indians, that said leases were made for a grossly inadequate consideration, that plaintiff's mother is uneducated and does not know land or rental values, and the defendants in dealing with her, were under the obligation while plaintiff was in the United States military service to deal fairly with her and pay a fair and adequate consideration for the use of said land, and owing to the difference in the position of the parties, the gross inadequacy of the consideration and the advantage

taken, said leases were absolutely void; that in law and good conscience the defendants could not make a large profit out of their dealings with the plaintiff and his mother and the plaintiff's property during the period he was in the United States military service.

That if the customary share of the crops had been turned over to the plaintiff for the years 1916, 1917 and 1918, he would have received about $2400.00 from said land, and that the defendants collected and retained that amount for themselves, and the value of the use of the land was at least the amount collected by the defendants and that the defendants unlawfully during each of said years sublet said land to tenants in violation of the statute and thereby forfeited their pretended leases.

The amended answer of the defendants in substance admitted the use and occupation of the land, set up the leases set out in plaintiff's petition, copies of which were attached, and further alleged that if the leases should be held void, they used and occupied the lands as tenants at will of the plaintiff and that they have paid the plaintiff in full for the use and occupation of the land.

In the trial in the District Court a stipulation covering some material facts of the controversy was entered into, as follows (Pr. Tr., p. 24):

"STIPULATION.

"It is hereby agreed by and betwen the plaintiff by his attorneys, Messrs. Neff & Neff,

and the defendants by their attorneys, Messrs. Crump, deGraffenried & White, that the following statement of facts are agreed to and may be offered in evidence in this case:

"*First.* That the plaintiff, Eli Bunch, is a full-blood, Cherokee Indian enrolled and recognized as such.

"*Second.* That he is the allottee of the land described in plaintiff's petition and is now and has been the legal owner thereof.

"*Third.* That during the year 1915, the plaintiff rented said land to the defendants for agricultural purposes by written contract for one year and by the terms of which the defendants were to pay the plaintiff $75.00 for the use and occupancy of the said land for the year of 1916, and that said sum was fully paid by the defendants in cash and accepted by the plaintiff in full satisfaction for the rent of said land for the year of 1916. That said contract was dated and executed on October 4th, 1915, for the use of said land for the year of 1915, and that these defendants used and occupied said land under said written contract.

"*Fourth.* That during the year of 1916, to-wit; on July 5th, 1916, the plaintiff again rerented said land to these defendants for the year of 1917 by written contract executed on said date and by the terms of which these defendants were to use and occupy said land during the year of 1917, for a cash rental of $75.00, which said sum was then and there paid by defendant and accepted by the plaintiff in full for the use and occupation of said premises for the year of 1917 and that defendants occupied said land during the year of 1917, as tenants of plaintiff under said contract.

"*Fifth.* That during the year of 1917 the plaintiff became a soldier of the United States Government and was enlisted in the navy; during said year he was stationed at New York under the control of the Government and that while in New York these defendants by J. B. Cole wrote to said plaintiff in regard to leasing the land for the year of 1918 and asked for a rental contract on same and that plaintiff Eli Bunch in reply to this letter advised the defendants that he had left his allotment in charge of Mary Sunday, his mother, and that they must go to see her in regard to renting it. And thereafter, to-wit, on July 28th, 1917, these defendants went to see Mary Sunday, the mother of the plaintiff in regard to the renting of said land and thereupon the said Mary Sunday as the agent of the plaintiff Eli Bunch, entered into a written contract as such agent with these defendants by the terms of which written contract she let and rented to these two defendants the said allotment of land for the year of 1918 for a cash consideration of $75.00 and that these defendants used and occupied said land during the year of 1918 under said written contract entered into with Mary Sunday as the agent of the plaintiff. And it is further agreed that this stipulation may be regarded as part of the pleadings for the purpose of motion on judgment on the pleadings.

NEFF & NEFF,
Attorneys for Plaintiff.

CRUMP, DEGRAFFENRIED,
& WHITE,
Attorneys for Defendants."

The foregoing statement of facts was supplemented by oral testimony (Pr. Tr., pages 29 to 47). This evidence mainly relates to the value of the crops raised upon the premises for the crop years of 1916, 1917 and 1918, a summary of which is, as stated by the court in his instructions to the jury, (Pr. Tr. 56) that the defendants, Cole and Mathews, received for the year 1917 $890.40, being the value of one-fourth the cotton and one-third of the corn raised on the land, which together with interest at 6% makes a total of $997.24; said defendants received for the year 1918, corn and cotton of the value of $384.35, which together with one year's interest at 6% makes a total of $407.41. The jury in the District Court pursuant to directions of the court, returned a verdict for the plaintiff in the sum of $407.41, being the value of one-fourth the cotton and one-third of the corn raised on the plaintiff's land for the year 1918, and interest thereon (Pr. Tr. 27). Judgment was rendered pursuant to the verdict, motions for new trial were filed by plaintiff and defendants which were overruled, defendants appealed to the Supreme Court of this state and the plaintiff filed a cross-appeal.

In the trial court it was conceded by counsel for defendants that the leases taken by the defendants were void (Pr. Tr. 28). The same concession was made by them in their brief in the Supreme Court of the State of Oklahoma. The cause was submitted to the Supreme Court of the state, which thereafter delivered a written opinion reversing the judgment

of the trial court, in which it held in the syllabus as follows (Pr. Tr. 72):

> "*1.* Any person in the possession of real property, with the assent of the owner, is presumed to be a tenant at will unless the contrary is shown, except as herein otherwise provided. Section 3783, R. L. Okla., 1910."
>
> "*2.* A tenant in possession of land under a void or voidable lease for one or more years creates a tenancy at will."
>
> "*3.* A tenancy at will is an estate which simply confers a right to the possession of the premises leased for such indefinite period as both parties shall determine such possession shall continue."
>
> "*4.* Where an Indian leases his restricted land for a cash rental, even though the lease be void and the tenant is permitted to occupy the premises during the term of the lease, such Indian cannot thereafter maintain an action to recover the rental value of the land based on a share of the crop for the year so rented."
>
> "*5.* Where a tenant enters into possession under a void lease and he is permitted by the landlord to retain such possession, the terms specified in the lease for the payment of rent governs the tenant's liability for rent and the landlord's right to recover for the use and occupancy of the premises."

The Supreme Court of Oklahoma reversed the case with directions to render judgment for defendants, respondents herein (Pr. Tr. 77).

Petition for rehearing was filed by Eli Bunch, plaintiff in error, in that court, in which it was alleged in substance that the Supreme Court of the State of Oklahoma held that section 3783, Revised Laws, 1910, was applicable to a lease executed by a full-blood Cherokee Indian to his allotted land, and that said opinion was repugnant to the statutes of the United States and the policy of the United States government in exercising a protecting control over full-blood Indians and their lands. This petition for rehearing was denied and the plaintiff in error appealed to the Supreme Court of the United States, his petition for writ of *certiorari* being granted on the 15th day of November, 1922. Plaintiff in error, for grounds of reversal of the judgment of the Supreme Court of the State of Oklahoma, makes the following assignments of error:

> "*1.* The Supreme Court of the State of Oklahoma erred in directing the trial court to sustain the motion of the defendants, J. B. Cole and T. B. Matthews for judgment on the pleadings and stipulation of facts and render judgment in favor of the defendants and against the plaintiff.
>
> "*2.* Said Supreme Court erred in not holding that section 3783, Oklahoma Revised Laws of 1910 as applied to leases of a full-blood Cherokee Indian of his allotted lands is repugnant to the statutes of the United States.
>
> "*3.* The Supreme Court of the State of Oklahoma erred in holding and deciding that the leases taken by J. B. Cole and T. B. Mathews from Eli Bunch, which were prohibited by the laws of the United States, created rights in their

favor and fixed the amount which J. B. Cole and T. B. Mathews were required to pay for rent of the allotted land of Eli Bunch.

"*4.* The Supreme Court of the State of Oklahoma erred in holding that J. B. Cole and T. B. Mathews, by taking possession of the allotted land of Eli Bunch, a full-blood Cherokee Indian, under the leases prohibited by the laws of the United States, became tenants at will by reason of the laws of the State of Oklahoma.

"*5.* The Supreme Court of the State of Oklahoma erred in holding and deciding that by reason of the laws of the State of Oklahoma, J. B. Cole and T. B. Mathews were not liable for the rents collected from the allotted land of Eli Bunch, a full-blood Cherokee Indian, by virtue of leases prohibited by the laws of the United States.

"*6.* The Supreme Court of the State of Oklahoma erred in not holding and deciding that the laws of the State of Oklahoma relied upon to defeat the action of the plaintiff, Eli Bunch, were repugnant to the statutes of the United States, making the leases relied upon in this action utterly void and prohibiting the taking of such leases.

"*7.* The Supreme Court of the State of Oklahoma erred in holding that the Chairman of the Council of Defense at Porum, Oklahoma, was entitled to retain the sum of $1,124.75 out of a total of $1,274.75, collected by renting out the land of Eli Bunch during the period he was in actual military service of the United States."

ARGUMENT.

The foregoing assignments of error will be presented under the following propositions:

First: The leases executed by Eli Bunch to J. B. Cole and T. B. Mathews were void.

Second: The leases being void, the Supreme Court of Oklahoma erred in holding that plaintiff's measure of recovery was the amount of rental stipulated in the void leases.

I.

The leases executed by Eli Bunch to J. B. Cole and T. B. Mathews were void.

There can be no question as to the invalidity of the leases and this, as before stated, was conceded by counsel for respondents in both the District Court of Muskogee County and in the Supreme Court of Oklahoma, and the opinion in the Supreme Court of Oklahoma was based upon this assumption. Section 5 of the Act of Congress of May 27th, 1908 (C. 199, 35 St. 312), is as follows:

> "*Sec 5.* That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions

therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this act, shall be absolutely null and void."

In *United States* v. *Noble,* 237 U. S. 74, 35 Sup. Ct. 532, 59 L. ed. 844, this court held that the authority granted to Quapaw Indian allottees by the provisions of the Act of June 7, 1897 (chap. 3, 30 Stat. L. 62), to lease their lands, did not empower such allottees to make leases subject to valid existing leases on the same property which still had several years to run. The lease there involved was a mining lease but the case has been followed and the same principle applied by the Supreme Court of the State of Oklahoma to agricultural leases on lands of allottees of the Five Civilized Tribes; and Eli Bunch, the full-blood Cherokee Indian plaintiff, is a member of one of these tribes.

In *Brown* v. *Van Pelt,* 64 Okla. 109, 166 Pac. 102, the syllabus reads:

"*1.* A lease made by a full-blood Creek Indian woman of her homestead allotment on January 4, 1913, to begin on January 1, 1914, and to expire December 31, 1914, the same not being approved by the Secretary of the Interior, is in violation of the Act of Congress of May 27, 1908, and is void.

* * * * * * *

"*4.* A lease executed on January 4, 1913, by a full-blood Creek Indian woman on her restricted surplus allotment to commence January 1, 1914, to run for a period of four years, where it

> is not shown that it was necessary to make the new lease at such time in order to regulate the course of cultivation that was to be pursued the subsequent year is void."

To the same effect are:

> *Apple* v. *Pierce*, 56 Okla. 13, 155 Pac. 892;
> *Reirdon* v. *Smith*, 62 Okla. 48, 161 Pac. 798;
> *Boxley* v. *Scott*, 62 Okla. 152, 162 Pac. 688;
> *Mullen* v. *Noah*, 64 Okla. 181, 166 Pac. 742;
> *Mullen* v. *Carter*, (Okla. Sup.) 173 Pac. 512;
> *Dowell, et al.*, v. *Brown, et al.*, 208 Pac. 220.

All of these cases are based on *United States* v. *Noble, supra; Brown* v. *Van Pelt, supra,* quoted with approval from that case as follows:

> "In the light of this restriction, and of the governmental policy which induced it, there is sound reason for construing the power as not authorizing anything more than a *lease in possession,* as well understood in the law."

The lease is also void in its entirety upon the following grounds:

The lease so far as concerns the homestead is void because it runs for more than one year from its date. A separate lease on Bunch's surplus allotment was not taken but the entire allotment was included in one lease. There was no separate consideration for the homestead and surplus. The entire lease is void since the transaction involved was one prohibited by positive federal statute. It was illegal in the sense that it was in violation of an express provision of law.

Further, under section 1681, Compiled Statutes of Oklahoma, 1921, it was a felony for the plaintiffs to place on record an instrument taken in violation of law affecting the title to the homestead allotment of Eli Bunch, a full-blood Cherokee Indian. This section is as follows:

> "1681. *Recording Deed—Punishment:* Any person, firm or corporation, who shall file for record or cause to be recorded any deed or other instrument in writing in the office of any register of deeds of any county in this state, purporting to convey any title to any real estate, allotted to any member of any one of the Five Civilized Tribes or Osage Tribe, as a homestead, prior to the removal of the restrictions by operation of law, or otherwise, knowing the land conveyed to be restricted homestead lands, shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary at hard labor for not less than one year."

A part being void and against the prohibition of positive law, and the consideration being entire, the whole lease is void.

It was held in *Mann* v. *Brady,* 80 Okla. 299, 196 Pac. 346, that a contract for the sale of lands which included the restricted forty acres homestead of a Creek Indian was void in its entirety and was not good as to the unrestricted portion of the land.

II.

The leases being void the Supreme Court of Oklahoma erred in holding that the plaintiff's measure of recovery was the amount of rental stipulated in the void lease.

The Supreme Court of Oklahoma in its opinion affirming the judgment of the District Court of Muskogee County, asserted the law to be as follows (Pr. Tr. 75):

> "Conceding the lease to be void, the rule is that if the tenant goes into possession under the lease and holds under the lease, the terms stipulating the amount of the rent to be paid shall govern the rents the landlord is entitled to receive as well as the amount of rents the tenant is liable for."

Citing in support of this proposition:

Evans v. *Winona Lumber Co.*, 16 N. W. 404;
Laughran v. *Smith*, 75 N. Y. 205;
Thurber v. *Dwyer*, 10 R. I. 355;
Larkins v. *Avery*, 23 Conn. 304;
Morrill v. *Mackman*, 24 Mich. 279.

The Supreme Court of Oklahoma at another place in the opinion said (Pr. Tr. 75):

> "If the lease was void so that he could have demanded possession of the premises but failing to demand possession he waived the right, therefore a tenancy at will existed.
>
> "This was held in *Peters* v. *Holder*, 40 Okla. 93, 136 Pac. 400: 'A tenant in possession under a void or defective lease for a term of years creates a tenancy at will, and, if periodical rent

be paid, the tenancy becomes one from year to year. *Tate* v. *Gaines*, 25 Okla. 141, 105 Pac. 193, 26 L. R. A. (N. S.) 106; 24 Cyc. 1031.

"Section 3783, Revised Laws of Oklahoma, 1910, provides: 'Any person in the possession of real property, with the assent of the owner, is presumed to be a tenant at will unless the contrary is shown, except as herein otherwise provided.'

"In *Tate* v. *Gaines*, 25 Okla. 141, 105 Pac. 193, Dunn, J., quotes approvingly from *Cunningham* v. *Holton*, 55 Mo. 33, which court defines a tenancy at will as follows: 'A tenancy at will is an estate which simply confers a right to the possession of the premises leased for such indefinite period as both parties shall determine such possession shall continue. The estate may arise by implication as well as by express words.'"

It will thus be seen that the Supreme Court of Oklahoma permitted a state statute, section 3783, *supra*, and state decisions applicable to others than Indians, to accomplish indirectly that which was prohibited by federal statutes and the governmental policy of the United States. We will presently discuss the cases cited by the court in support of its position, but let us first examine the applicability of the rule of law announced by the Supreme Court of the state to a restricted Cherokee Indian.

In *Franklin* v. *Lynch*, 233 U. S. 269, 18 L. ed. 954, this court held that equitable defenses urged against an intermarried Choctaw Indian were not applicable and that said lands could only be conveyed in con-

formity with the Acts of Congress and refused to give any efficacy to a state statute providing that the after acquired title of the grantor should inure to the grantee. Referring to the effect of the void deed the court said:

> "The deed of 1905 was therefore a nullity and did not estop her or her assigns from showing that it had been made in direct violation of the statute. For, to permit an Indian's deed, void when made, to operate as a conveyance of land subsequently allotted, would be to destroy the express language of the statute and to defeat the protective purposes for which the law was passed."

In the case of *Mullen* v. *Gardner*, 250 U. S. 590, 63 L. ed. 1158, this court again refused to apply the doctrine of estoppel as against a conveyance made in violation of an Act of Congress. We quote from the last paragraph of that opinion, the following language:

> "The provisions of the Supplemental Agreement having permitted no conveyance of an interest in the tribal lands prior to allotment, it is obvious that this policy cannot be evaded by giving to a conveyance with warranty or its equivalent, made prior to actual allotment, effect as a covenant to convey an allotment thereafter to be selected, either upon the ground of estoppel or because of any state statute having like force."

In *Laughton* v. *Nadeau*, reported in 75 Fed. 789, the court held that proceedings with reference to Indian lands, which were void by reason of being in

violation of a federal statute, could not be cured by ratification or waiver. We think the expression of that court in the last paragraph of its opinion is applicable to the case now before this court. We quote from that opinion as follows:

> "The defendants contend that the complainant is barred by laches and estoppel to maintain this suit, and have pleaded the Kansas statutes of limitation. The proceedings before the probate court being void, they could not be cured by ratification or waiver. There being no color of title, the statute of limitation does not apply. There could be no purchaser in good faith under these proceedings."

In the case of *Briggs* v. *Sample*, reported in 43 Fed. 102, the court had under consideration a case involving the lands of a Kickapoo Indian, and we quote from the first section of the syllabus the following language:

> "An Indian conveyed his land by warranty deed on the day he made such proof, and after he had obtained his patent conveyed the land to another grantee. *Held*, that the second grantee took the land, since the first deed, being made before patent, was ineffectual to convey the land, either directly or by estoppel."

In the case of *Starr* v. *Long Jim*, decided by this court, and reported in 227 U. S. 715, 57 L. ed. 671, it was held that a conveyance made in violation of a federal statute could not pass title, nor could the plea of estoppel be urged in behalf of such a conveyance. The language of the opinion in the last paragraph is as follows:

"Since it is entirely plain, in the case before us, that the title to the lands in question was retained by the United States for reasons of public policy, and in order to protect the Indians against their own improvidence, it follows as a matter of course that a conveyance made by one of them, before the title was vested in him pursuant to the Act of 1905, was in the very teeth of the policy of the law, and could not operate as a conveyance, either by its primary force or by way of estoppel."

In the case of *Oklahoma Oil Company* v. *Bartlett*, 236 Fed. 488, the Circuit Court of Appeals of the Eighth Circuit, in referring to the equitable principles of ratification and waiver, used the following language on page 494:

"The contention cannot be sustained. The proceedings before the County Court of Hughes County, Oklahoma, were void and could not be cured by ratification or waiver. The deed approved by said County Court without jurisdiction, was a nullity, and such conveyance was void. There could be no purchaser in good faith under these proceedings. No laches can be imputed to Jack Gouge. He and his land were under the control of the government. *Laughton* v. *Nadeau, et al.*, (C. C. A.) 75 Fed. 789; *Felix* v. *Patriet*, 145 U. S. 317, 12 Sup. Ct. 862, 36 L. ed. 719. The United States statute prohibited the defendant or his grantor from taking title to the property in controversy without the approval of the County Court having jurisdiction of the settlement of the estate of said deceased allottee, and defendant cannot indirectly build a title by estoppel or any statute of limitation."

Both the questions of estoppel and the statute of limitations were before the Supreme Court of the State of Kansas in *Sheldon* v. *Donohoe*, reported in 19 Pac. 902, and we call attention to the language of the court as found on page 903:

> "Donohoe had no other title nor any better right to convey to Sheldon than he had when the void deed was made. Sheldon was incapable of taking the title to the land then, and has been ever since that time. By the paramount federal law he was prohibited from taking the title, and therefore he cannot indirectly build up one by adverse possession, estoppel, or any statute of limitations."

We call the court's attention to the case of *Monson* v. *Simonson*, decided by this court and reported in 231 U. S. 344, 58 L. ed. 260, wherein the court discussed the application of the rule with reference to after acquired title. In the next to the last paragraph we find the following language:

> "As that patent was issued June 29, 1905, and as the deed from the allottee upon which alone the judgment of affirmance was rested was made and delivered May 31, preceding, it follows that this deed was, in the language of the statute, absolutely null and void, and that the title subsequently acquired by the allottee through the final patent could not inure to the plaintiff in virtue of his being the grantee in that deed. See, *Starr* v. *Long Jim*, 227 U. S. 613, 624, 57 L. ed. 670, 675, 33 Sup. Ct. Rep. 358. A state statute could not make it the basis of passing subsequently acquired title when the federal statute pronounces it entirely void."

In numerous decisions of the Supreme Court of the State of Oklahoma that court has held that where there is a conflict between a state statute and a federal statute or a state statute and the policy of the United States Government is exercising its protective care over the persons and estates of Indian allottees, that the former must yield to the latter. Thus in the case of *Malone* v. *Wamsley*, 80 Okla. 181, 195 Pac. 484, the Supreme Court of Oklahoma said:

> "Section 1 of the Enabling Act under which Oklahoma was admitted into the Union (34 Stat. L. 267) provides 'that nothing contained in the state constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territory (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this act had never been passed.' The Constitutional Convention of Oklahoma by a proper resolution irrevocably accepted the terms of the Enabling Act, and it is apparent under the provisions of the Enabling Act, Congress specifically reserved the right to exclusively legislate with respect to the Indian tribes located in the State of Oklahoma, and regulate the sale of their allotted lands. In determining the power of members of the Five Civilized Tribes to alienate their lands, we must look only to the laws of Congress.
>
> "In the case of *Gorman* v. *Sheldon*, Mr. Justice KANE, speaking for this court, said: 'The

reason the state cannot legislate for an Indian of the Five Civilized Tribes is that Congress has reserved the right to legislate for him as a dependent people.' 43 Okla. 139, 131 Pac. 680.

"In the case of *Collins Inv. Co., et al.*, v. *Beard,* wherein a construction of sections 884 and 885, Revised Laws of 1910, was involved, which sections, when considered together, provide that a minor of 18 years of age has a limited right to contract relative to his lands subject to his disaffirmance upon becoming of age by restoring the consideration, this court, in the opinion delivered by Commissioner BREWER says: 'The statutes above referred to need no analysis, or even a construction here for the reason that when the question of the removal of the restrictions of allotted lands, or the right of alienation of such lands, or the power of alienation is involved, we must look to the Acts of Congress, and to those acts and laws alone. In other words, if a state law, by its language or through its proper construction or its operation would permit the alienation of restricted Indian allotment, or render a deed thereto effective, where the land would not be alienable or the deed thereto effective under the acts of Congress dealing with the subject-matter, then the state laws fail; and this, because of federal government retained jurisdiction in these Indian matters to the extent stated in the Enabling Act, under the terms of which Oklahoma became a state; and this reservation of jurisdiction was assented to in the constitution which the people adopted.' 46 Okla. 310, 148 Pac. 846.

"In the case of *Smith* v. *Williams, et al.*, Mr. Justice HARRISON, delivering the opinion of this court, held: 'From the beginning it has

been the stated policy of this court and also the federal courts, in determining the validity of deeds to restricted Indian lands, to look to the acts of Congress alone.' 78 Okla. 297.

"*Walker* v. *Brown*, 43 Okla. 144, 141 Pac. 680; *Jefferson* v. *Winkler*, 26 Okla. 653, 110 Pac. 755; *Murrow Indian Orphans Home* v. *McClendon*, 64 Okla. 205, 166 Pac. 1101; *Ex parte Webb*, 225 U. S. 663; *Williams* v. *Johnson*, 239 U. S. 414; *Brader* v. *James*, 246 U. S. 88; *Truskett* v. *Closser*, 198 Fed. 635; *Barbre* v. *Hood*, 228 Fed. 658.

"It is now well settled in this jurisdiction that the County Courts, in approving conveyances of full-blood Indian heirs, perform the duty of federal agents, and are controlled and regulated by the laws of the Congress, and in determining the validity of the acts of the County Courts in approving conveyances executed by Indian heirs, we must look solely to the Acts of Congress."

In *Smith* v. *Williams*, 190 Pac. 555, the Supreme Court of Oklahoma say:

"The principles of equity, though not overturned nor disregarded, are not controlling in such cases, for the reason that they are not applicable. The right on the part of an Indian to alienate his land, and the right on the part of any person to purchase such land and to acquire valid title thereto is peculiarly and strictly a statutory right created by Acts of Congress, and which right is not possibly available except through the means which Congress has prescribed, for Congress has expressly said that any attempt to acquire such rights, except through the means prescribed by Congress, shall

be absolutely null and void. Therefore title to restricted Indian land cannot be acquired from the allottee upon equitable grounds. The methods prescribed by Congress are exclusive."

To the same general effect are:

Jackson v. *Carroll*, .. Okla. ..., 207 Pac. 735;

Murrow Indian Orphans Home v. *McClendon*, 64 Okla. 205, 166 Pac. 1101;

Ashton v. *Noble*, 46 Okla. 296, 148 Pac. 1042;

Miller v. *Grayson*, 166 Pac. 1077;

Groom v. *Dyer*, 179 Pac. 12;

Parks v. *Berry*, 169 Pac. 884;

Wrigley v. *McCoy*, 175 Pac. 259;

Cravens v. *Amos*, 166 Pac. 140;

Whitmire v. *Levine*, 80 Okla. 21, 193 Pac. 884;

Tidal Oil Co. v. *Flanagan*, 209 Pac. 729;

Bell v. *Fitzpatrick*, 53 Okla. 574, 157 Pac. 334;

Brink v. *Canfield*, 187 Pac. 223.

See, also:

Barbre v. *Hood*, 228 Fed. 628;

Priddy v. *Thompson*, 204 Fed. 995;

Blanset v. *Cardin*, 256 U. S. 319, 65 L. ed. 950.

The opinion of the Supreme Court of the State of Oklahoma in this case, if permitted to stand, will nullify section five of the Act of Congress of May 27th, 1908, *supra*, which made the lease null and void and will thereby frustrate the governmental policy

in dealing with these dependent people, for, in applying section 3783, *supra,* of the Oklahoma Statutes, the court holds in effect that if the lessee under the void lease secures possession of the premises he will only be required to pay the rent stipulated in the lease. This will permit to be done indirectly what the Congress of the United States prohibits. It leads to an absurdity for, under the rule thus announced, a designing person would be permitted to secure the signature of an incompetent full-blood Indian to a lease of his allotted lands for five or ten years at a rental of $10.00 per year, secure possession of the leased lands and, when dispossessed, would be required to pay only the amount of rent stipulated in the lease. This would certainly effectually enforce a material provision of the void lease.

The cases cited by the Supreme Court of Oklahoma in support of the rule announced by it that where a tenant enters into possession under a void lease and is permitted by the landlord to retain such possession, the terms specified in the lease for the payment of rent govern the tenant's liability for rent and the landlord's right to recover for the use and occupancy of the premises are not, in our opinion, applicable for the reasons heretofore stated and for other reasons. The rule announced by these cases is in harmony with the general rule that where a statute of frauds requires a lease to be in writing and an oral lease is made, which, because of said statute, cannot be enforced and possession is taken un-

der the oral lease, the terms of the oral lease govern, except as to the period of renting. This rule does not apply to a lease that is void because made in violation of an express statute or of public policy. Nor does it apply to a lease made by any person *non sui juris.* In the case of an oral lease required to be in writing under the statute of frauds the parties are capable, at the time, of making a valid lease and if the lease had been made in writing it would be valid and enforceable. In other words, they had the right to contract. Such leases have never been regarded as void in the sense that they are prohibited by law.

At the time Eli Bunch made the leases in controversy the statutes of the United States expressly prohibited the making of such leases and the defendants were prohibited likewise from taking such leases and the statute declared such leases to be null and void. It was not a case of two persons competent to contract making an oral lease when the law required the lease to be in writing, but was a lease being made in writing which the law in express terms prohibited from being made at all.

We understand the correct rule is that where a contract is prohibited by law none of its terms can be regarded for any purpose and where one of the persons making it is *non sui juris,* the other party can claim no right based upon the void instrument.

In *Gennert* v. *Wessner,* (N. J.) 31 Atl. 609, the court said:

"The contract is wholly void and incapable of ratification, and must be entirely ignored, in dealing with the business transactions between the parties, precisely as though no such writing had ever existed."

To the same effect are:

Day v. *McAllister,* 15 Gray 433;
Winfield v. *Dodge,* (Mich.) 7 N. W. 906;
State v. *Ryan,* (N. J.) 8 Atl. 293.

It was said by the Supreme Court of Wisconsin in a lease case:

"The written instrument offered in evidence, as we have said, was void. It was not competent to prove the contract by it. What, then, was the contract as to the payment of rent? This must be determined without regard to the terms of the written agreement. This logically follows from the fact that that agreement was void, and could not be resorted to to determine the contract of the parties."

—*Vinz* v. *Beatty,* 21 N. W. 787.

Regarding the effect of a void lease, the Supreme Court of Iowa, in *McIntosh* v. *Lee,* 57 Iowa 356, 10 N. W. 895, said:

"But something more than mere occupation of the premises would be necessary to the ratification of the lease. That might render the tenant liable under an implied promise for the *quantum meruit,* but not for the rent stipulated in the lease according to its terms."

In the case of *McGreedy* v. *Macklin,* 12 Okla. 666, 73 Pac. 293, the Supreme Court of Oklahoma had un-

der consideration a matter wherein the lease of a restricted Indian of one of the tribes in Oklahoma had been made, which lease was approved by the Secretary of the Interior and contained a provision forbidding the subletting, assigning, leasing, conveying or transferring of any interest of the lessee without the consent of the Indian lessor and the approval of the Secretary of the Interior, and the lessee in violation of said provision, having sublet the premises or a portion thereof to the defendant, brought a suit to recover the stipulated rental from the defendant and the court in that case held that the assignment or subletting being in violation of that provision was void and created no rights and, in its opinion, quoted from the case of *Uhlig* v. *Garrison,* 2 Dak. 71, 2 N. W. 253, as follows:

> "The contract in this case is to be distinguished from those which are merely void from want of compliance with some form or those lacking any other essential. Here it was prohibited by statute and being unlawful it does not fall within the class of contracts which are void because of the inefficiency of one of the parties or because of the statute of fraud. * * * "

And, in the opinion of the case, further said:

> "The theory of the law is that while the relations the parties occupy toward each other might, and no doubt would, under ordinary circumstances create the relation of landlord and tenant, yet by reason of the illegality of their contract the relation of landlord and tenant is not created and does not legally exist."

Therefore in the case at bar the contract between Bunch and the lessees being forbidden by the statute no contract exists and not even the relation of landlord and tenant exists between the parties, and in that state of law the plaintiff is entitled to recover under section 7359 of the Compiled Oklahoma Statutes of 1921, which provides as follows:

> "The occupant of any land without special contract shall be liable for the rent to any person entitled thereto,"

and which statute has been construed by the Supreme Court of Oklahoma to give the owner of the land the right to recover the reasonable rental value irrespective of the relation of landlord and tenant.

—*McBrayer* v. *Miller*, 200 Pac. 988, and authorities cited therein.

As the Indian was at all times the owner of the land and the contract being void and creating no rights as to either party and prohibiting no right on behalf of the Indian on account of the United States statute prohibiting the lease being made for his benefit, the Indian under the state statute quoted above is entitled to and should recover the actual value of his rents from the premises.

It is settled by the case of *U. S.* v. *Hinkle*, 261 Fed. 518, decided by the Circuit Court of Appeals for the Eighth Circuit, that one who occupied lands of a full-blood Indian under illegal contracts must account for the rents collected. In that case it was held:

"*2.* The United States, in a suit for cancellation of conveyances of Indian lands made in violation of restrictions upon their alienation, may have an accounting of mineral rents and profits unlawfully received by defendants."

It is true that in that case the suit was by the United States, but the United States could sue only in behalf of the Indian. If the Indian was not entitled to the rents, the United States could not sue for their recovery. So we regard this case as directly in point.

It will be noted that the Supreme Court of Oklahoma, in its opinion in the case at bar, stated that the relation created by the respondents remaining in possession under the void lease was a tenancy at will (Pr. Tr., p. 75). In the case of *Dowell, et al.*, v. *Brown, et al.*, 208 Pac. 220, under a similar situation the court held that the relation created was that of tenancy by sufferance and that the amount of the recovery was the rental value of the premises for the time withheld, in the following language:

"The reasons above given in that case, where the deed was void and the whole estate in the property involved, and in the instant case, where the leasehold estate is involved are analogous, and the valid lease thereto contained no provision for making improvements or payment therefor, but did provide that the lessee agrees to repair fence and house on the premises, and, in addition thereto, was to pay a rental value for the premises of $60 per annum for the period of five years. And the valid lease having expired

by its own terms, as hereinbefore stated, on the 31st day of December, 1917, and as the lessee held over thereafter, and used the premises for the years 1918 and 1919, being, in effect, at most, a tenant by sufferance, he became bound to the owner for the rental value of the premises for said years, and, the owner being under no contract, either expressed or implied, to pay for the value of improvements, such tenant could not offset the value of the same against the claim of the owner for rents. And in such situation the fact that improvements may have been made by the tenant, and, if any, the value of the same were immaterial, and the trial court committed no error in sustaining the objections of the plaintiffs to the defendant's offer to show that certain improvements had been made by him, and the value thereof."

For the foregoing reasons we respectfully submit that the Supreme Court of Oklahoma erred in reversing the decision of the District Court of Muskogee County and directing that court to render judgment for the defendants, respondents herein.

We pray that the judgment of the Supreme Court of Oklahoma in this cause be reversed.

Respectfully submitted,

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